IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

MACON COUNTY INVESTMENTS, INC.,)
REACH ONE, TEACH ONE)
OF AMERICA, INC.,)
)
Plaintiffs,)
) CASE NO. 3:06-cv-224-WKW
v.)
)
SHERIFF DAVID WARREN, in his official)
capacity as the SHERIFF OF MACON)
COUNTY, ALABAMA,)
)
Defendant.)

ORDER

This cause is before the Court on the defendant's Motion to Dismiss (Doc. # 8), as well as the plaintiffs' motions for expedited discovery (Doc. # 2), for preliminary injunction and expedited hearing (Doc.# 3), to strike defendant's motion to dismiss and various responses (Doc. # 12), and for application of default judgment (Doc. # 13).

Defendant has responded to all of the plaintiffs' motions, but the plaintiffs have not replied directly to the defendant's motion to dismiss. Upon due consideration, the Court will deny the plaintiffs' motion for default judgment, establish a briefing schedule for the motion to dismiss, and reserve ruling on the motions for expedited discovery and hearings pending resolution of the issues raised in the defendant's motion to dismiss.

1. Default Judgment and Motion to Strike

Process was delivered to Valerie Smith, a dispatcher and employee of the defendant at the Macon County Detention Facility, on Saturday, March 11, 2006. According to the defendant, "[M]s. Smith is not a deputy and her duties do not include accepting service of process on behalf of the

Sheriff's Office." (Aff. of David Warren, Ex. 1 to Doc. # 14). On March 13, 2006, an employee of the defendant delivered the process to the defendant, who immediately turned it over to his attorneys. Defendant filed his motion to dismiss at 12:10 pm CDT, and his brief in support of the motion at 12:26 pm on April 3, 2006, twenty days from the date he personally received the papers, but 23 days after delivery of the papers to Ms. Smith. At 4:51 pm CDT the same day, plaintiffs filed their Application for Default Judgment. Defendant also filed a response to motion to expedite discovery (Doc. # 10) and response to application for preliminary injunction (Doc. # 11) on April 3, 2006. The filings of defendant were not perfunctory, but contained substantive arguments and extensive exhibits.

Plaintiffs insist default is appropriate because the defendant did not raise insufficiency of service of process in his motion to dismiss, thereby waiving it,[1] and because the defendant did not offer affidavits to support his position. The latter point is lost upon the Court in that an affidavit of the defendant appears as Exhibit 1 to his response to the application for default judgment. (Doc. # 14-2). Plaintiff has not responded with any evidence to contradict the affidavit, leaving it to speak unhindered. As to the failure of the defendant to mention insufficiency of service of process in his responsive pleading, it should first be acknowledged that the defendant was properly served; the dispute is *when*. Moreover, his response was consistent with his actual receipt of the process, in that his response was filed within twenty days as required by the rules, and prior to the filing of the application for default judgment. Finally, plaintiff has failed to demonstrate any prejudice or harm suffered because of the three day delay.

---

[1] Plaintiff cites *Sanderford v. Prudential Ins. Comp.*, 902 F.2d 897 (11th Cir. 1990), for the proposition that the defense of insufficiency of process or *the insufficiency of service of process* is waived if it is not included in the defensive motion or responsive pleading. Pl. Reply, Doc. # 15, p.2. *Sanderford* has nothing to do with insufficiency of service of process, which is evident from any reading of the case. Further, it actually supports the defendant's position in that *Sanderford* demonstrates the level of a party's neglect likely to support the entry of default judgment. *Sanderford*, 902 F.2d at 901 (finding court's entry of default judgment proper despite imperfect process where party failed to challenge insufficiency of process or respond to court's and adverse party's series of notices that were properly served).

Having duly considered the plaintiffs' arguments, it is ORDERED that the Application for Default Judgment (Doc. # 13) is DENIED. For the same reasons, the plaintiffs' Motion to Strike (Doc. # 12) is DENIED.

2. Briefing Schedule

Upon consideration of the defendant's Motion to Dismiss (Doc. # 8), it is ORDERED that the motion be submitted without oral argument on May 9, 2006, and that the plaintiffs shall file a response **on or before May 9, 2006.**

3. Expedited Discovery and Hearing

Upon consideration of the plaintiff's motions for expedited discovery and hearing (Doc. # 2 and # 3), it is ORDERED that rulings on the motions are RESERVED pending resolution of the defendant's motion to dismiss. It is further ORDERED that a status conference is SET for **May 16, 2006, at 4:00 p.m.** by conference call arranged by counsel for the plaintiffs.

DONE this the 2nd day of May, 2006.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE